

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

RECEIVED
MAY - 3 1993FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)

Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992)

MM Docket No. 92-259

Broadcast Signal Carriage Issues)

To: The Commission

PETITION FOR RECONSIDERATIONSUMMARY

This Petition For Reconsideration is submitted on behalf on Anchor Media Ltd., licensee of commercial television station WSYX, Columbus, Ohio. The Commission's Report and Order in this matter amended 47 C.F.R § 76.51 by redesignating the Columbus, Ohio market to include Chillicothe, Ohio. By failing to provide the required notice and opportunity to comment regarding the rule amendment, and by failing to provide any justification or basis for its action, the Commission violated the Administrative Procedure Act as well as the Commission's longstanding practice. Moreover, the undocketed proposal apparently prompting the Commission's action failed to make the evidentiary showing necessary to justify amendment of Section 76.51. Petitioner respectfully requests reconsideration before June 2, 1993, the date the Commission has ordered cable systems to begin carriage of broadcast signals under the new must-carry rules.

No. of Copies rec'd
List A B C D E

045

TABLE OF CONTENTS

In the matter of)	
)	
Implementation of the Cable)	
Television Consumer Protection)	MM Docket No. 92-259
and Competition Act of 1992)	
)	
Broadcast Signal Carriage Issues)	

PETITION FOR RECONSIDERATION

I. Background and Introduction.

Anchor Media Ltd., licensee of commercial television station WSYX, Columbus, Ohio ("WSYX"), by its attorneys, hereby respectfully petitions the Commission to reconsider its decision in the above-captioned Report and Order ("R&O") to amend Section 76.51 of the Commission's rules by redesignating the Columbus, Ohio market to include Chillicothe, Ohio. The Commission apparently promulgated this amendment to Section 76.51 as part of this proceeding because of a comment filed by Triplett & Associates, licensee of WWAT(TV), Chillicothe, Ohio ("WWAT"). See R&O at ¶ 50 n.149. Because the Commission's new must-carry provisions become effective June 2, 1993, WSYX respectfully requests expedited consideration of this Petition. Failure of the Commission to correct its procedurally and substantively flawed decision to amend the Columbus market designation before June 2 would result in the unwarranted compulsory carriage of distant signal WWAT on Columbus cable systems.

As discussed more fully below, the Notice of Proposed Rulemaking in MM Doc. No. 92-259, 7 FCC Rcd 8055 (1992), failed to provide any notice that the Commission was considering a specific amendment to Section 76.51 to redesignate or hyphenate the Columbus, Ohio market. Consequently -- in violation of the Administrative Procedure Act ("APA") -- WSYX and other interested parties were denied an opportunity to participate in that aspect of the Commission's rulemaking process. Moreover -- also in violation of the Administrative Procedure Act -- the Commission wholly failed to provide the basis, justification, or reasoning supporting its decision to amend Section 76.51 with respect to the Columbus market. Finally, the comment filed by WWAT (incorporating by reference its petition for a rulemaking and its two supplements to that petition) failed to make the necessary evidentiary showing to justify an amendment to Section 76.51.

II. The Commission Failed To Follow Its Longstanding Practice For Amending Section 76.51 And Failed To Provide The Required Notice And Opportunity to Participate.

The APA mandates that a notice of proposed rulemaking must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The APA further provides: "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making

through submission of written data, views, or arguments" Id. at § 553(c). By announcing amendment of the Columbus market designation in the R&O as a fait accompli -- without any notice that the Commission was considering such an amendment, and without any request for comments on WWAT's proposal 1/ -- the Commission violated the notice and opportunity for comment requirements of the APA. 2/ See Reader v. FCC, 865 F.2d 1298, 1304 (D.C. Cir. 1989).

market. 3/ In paragraph 22 of the NPRM, the Commission merely requested "specific comment on what modifications to the list of television markets specified in Section 76.51 of our rules are needed to ensure that it reflects current market realities." 7 FCC Rcd at 8060. In particular, the Commission sought comments regarding the use of Arbitron's current list of market designations, whether the Commission should expand the list under Section 76.51 to include all markets, whether the list should be updated annually, whether the Commission should establish procedures to amend the list periodically, or whether the Commission should continue to amend individual market designations in response to individual rulemaking petitions. Id.; see R&O at ¶ 49 ("We had hoped that in response to the Notice commenters would provide us with a mechanism for

3/ The R&O also refers to two other NPRMs. The first, Second Further Notice of Proposed Rule Making, MM Doc. No. 90-4, 6 FCC Rcd 4545 (1991), deals with the effective competition standard and does not refer to market designation issues under Section 76.51. That proceeding was "terminate[d] . . . in light of the must-carry provisions of the 1992 Cable Act." R&O at ¶ 2 n.3. The second, Notice of Proposed Rule Making, MM Doc. No. 92-295, 7 FCC Rcd 8591 (1992), deals specifically with a petition for rulemaking filed by TV 14, Inc. ("TV 14") of Rome, Georgia seeking to amend Section 76.51 to change the designation of the Atlanta television market to "Atlanta-Rome." See R&O at ¶ 50 n.149. The notice in the TV 14 proceeding does not refer to the possibility of the Commission amending the rule to change the designation of any other market.

revising the top 100 market list, including criteria for determining when a city of license should become a designated community in a television market.") 4/

The Commission did not seek comment on any specific proposals to amend particular markets specified in Section 76.51, nor did it refer to WWAT's pending April 19, 1988 petition for rulemaking or WWAT's pending June 21, 1991 supplement to its petition for rulemaking. The Commission, therefore, failed to alert WSYX and other interested parties to the fact that it was considering a specific amendment to a rule affecting all cable companies and television stations in and around the Columbus market, rather than simply considering various ways the Commission should deal with future proposals to amend Section 76.51. See Reeder, 865 F.2d at 1304; cf. Amendment of § 76.51 (Fresno-Visalia, California), 57 RR 2d 1122, 1124 (1985) (because "very purpose" of proceeding was to

4/ The Commission also asked commenters to consider the potential effects of any market designation changes on the applicable exclusivity and nonduplication rules. 7 FCC Rcd at 8060, ¶ 23.

consider additions to Fresno market designation, notice was adequate to expand proceeding to related communities). 5/

Moreover, in the NPRM the Commission explicitly stated that it would continue its longstanding practice of "consider[ing] ad hoc revisions to the list through individual rulemaking notices." 7 FCC Rcd at 8060 n.27. Under that longstanding practice, a party proposing an amendment to a market designation under Section 76.51 files a petition for rulemaking, the Commission determines whether to issue an NPRM setting forth the petitioner's arguments for the amendment and, if an NPRM is issued, the Commission gives interested parties

5/ A specific amendment to the Columbus market designation was not a "logical outgrowth" of the NPRM. Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445-446 (D.C. Cir. 1991). The Columbus market is one of a hundred designations under Section 76.51. Neither WSYX nor any other interested party could have anticipated ex ante that the Commission would choose to modify the Columbus market designation on the basis of the general

the required opportunity to comment and respond. 6/ Adoption or amendment of a rule in a manner deviating from longstanding practice without notice is also a violation of the APA.

Reeder, 865 F.2d at 1304.

In fact, the Commission followed its longstanding practice with respect to TV 14's petition for rulemaking to amend Section 76.51 to change the designation of the Atlanta, Georgia market to Atlanta-Rome. Request by TV 14, Inc., To Amend Section 76.51, 7 FCC Rcd 8591, 8591 (1992). The Commission granted TV 14's request as part of the R&O in this proceeding -- but only after the Commission had given interested parties an opportunity to comment. See id.; R&O at ¶ 50 n.149. In contrast, although WWAT had been seeking a rulemaking to amend the designation of the Columbus market, the Commission never issued an NPRM and never afforded interested parties an opportunity to comment on WWAT's proposal.

Finally, in the R&O the Commission delegated authority to the Chief of the Mass Media Bureau to act on petitions for a

6/ See, e.g., Amendment of § 76.51 (Fresno-Visalia, California), 57 RR 2d 1122, 1122, 1124 (1985); Amendment of Section 76.51 (Orlando-Daytona Beach, Melbourne, and Cocoa, Florida), 102 FCC 2d 1062, 1062-63 (1985); Amendment of Section 76.51 (Television Muscle Shoals, Inc.), 48 RR 2d 1191, 1191, recon. denied, 87 FCC 2d 507 (1981).

rulemaking to amend 76.51. The Commission emphasized that "requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals. Interested parties will then have a full opportunity to participate in the proceeding and to react to the proposal." R&O at ¶ 50 n.150. Thus, in the case of amending the Columbus market designation -- for reasons it did not explain -- the Commission followed neither its past practice nor the practice it directed the Chief of the Mass Media Bureau to follow in the future.

In sum, "the notice given by the Commission was wholly inadequate to enable interested parties to have the opportunity to provide meaningful and timely comment on the proposal which culminated in the final decision of the agency" to amend the Columbus market designation under Section 76.51. National Black Media Coalition, 791 F.2d at 1022. By not issuing proper notice and by failing to provide interested parties with an opportunity to respond to WWAT's proposal, the Commission's decision to amend the Columbus market designation violated both Commission practice and the APA.

III. By Failing To Explain Any Basis Or Justification For Amending The Columbus Market Designation Under Section 76.51, The Commission Failed To Engage In Reasoned Decisionmaking And Its Decision To Amend The Columbus Market Designation Was Arbitrary And Capricious.

The R&O fails to provide any explanation or reason justifying an amendment to the Columbus market designation under Section 76.51. The R&O merely summarily concludes that certain parties had "provid[ed] specific evidence that change to a particular market is warranted." R&O at ¶ 50. In the case of the Columbus market designation, the Commission failed

California v. FCC, 905 F.2d 1217, 1230-31 (9th Cir. 1990);

National Black Media Coalition, 791 F.2d at 1023-24. 7/

Furthermore, the Commission failed to apply the standard for amending individual market designations it established in the R&O: "evidence that demonstrates commonality between the proposed community to be added to a market designation and the market as a whole" R&O at ¶ 50. By not addressing or applying its own test for amending Section 76.51, the Commission did not engage in "reasoned decisionmaking." Reeder, 865 F.2d at 1305. The Commission also failed to consider on the record the factors it has considered important in past rulemakings to amend Section 76.51. See, e.g., Amendment of § 76.51 (Fresno-Visalia, California), 57 RR 2d at 1124. Nor did the Commission address

7/ Under the APA, the Commission must adopt a "concise general statement" setting forth a rule's (or amendment's) "basis and purpose." 5 U.S.C. § 553(c). The statement of basis and purpose must identify the major policies at issue and the reason for the agency's decision. St. James Hosp. v. Heckler, 760 F.2d 1460, 1469 (D.C. Cir.), cert. denied, 474 U.S. 902 (1985). The statement must also provide reasons for rejecting "reasonably obvious alternatives." Walter O. Boswell Memorial Hosp. v. Heckler, 749 F.2d 788, 797 (D.C. Cir. 1984). In this instance, the Commission failed to provide any basis for amending the Columbus market designation and failed to consider on the record the "reasonably obvious alternative" of taking no such action -- likely because the Commission failed to solicit possible comments opposing WWAT's request.

the impact its amendment will have on exclusivity and non-duplication rules, an impact the Commission itself termed "significant" in the same paragraph it summarily changed the Columbus market designation. R&O at ¶ 50; see also id. at ¶ 48. Nor did the Commission discuss the potential costs to the public and Columbus area television stations and cable companies of hyphenating the Columbus market, or weigh such costs against any potential benefits. See Television Muscle Shoals, Inc., 48 RR 2d at 1194.

By not considering any of the above relevant factors, the Commission failed to demonstrate a "rational connection" between the facts before it and the choice it made. Home Box Office, Inc., 567 F.2d at 35.

IV. WWAT's Comment In This Proceeding Failed To Make The Necessary Evidentiary Showing To Justify Amending Section 76.51 To Include Chillicothe In The Columbus Market.

As noted above, WWAT's burden was to provide the Commission with "evidence that demonstrates commonality between [Chillicothe] and the [Columbus] market as a whole." R&O at ¶ 50. Neither WWAT's comment filed in this proceeding nor the filings it incorporated by reference -- undocketed April 19, 1988 petition for rulemaking ("Petition"), undocketed June 21, 1992 supplement to its petition ("First Supplement"), and undocketed January 4, 1993 second supplement to its petition ("Second Supplement") -- purport to meet that standard.

To show commonality between Chillicothe and Columbus,
WWAT merely recited unremarkable facts, including:

(1) Chillicothe's location "about" 45 miles from Columbus, Petition ¶ 1; (2) Columbus' status as the commercial center of the area, Petition ¶ 7; (3) Ross County's location (where Chillicothe is located) within the Columbus ADI, Petition ¶ 2; (4) WWAT's construction permit to provide City Grade coverage over more than half of the city of Columbus and Grade A coverage "over substantially all of the remainder of the city," Second Supplement ¶ 2; (5) local cable companies' carriage of Columbus television stations

situation -- whose genesis likely may be traced to its owner's gambit in establishing a station for the purpose of competing in a distant market -- is hardly sufficient to justify amending a Commission rule. 8/

Finally, WWAT admits that its only interest in petitioning the Commission to include Chillicothe in the Columbus area market under Section 76.51 was to obtain advantages under the compulsory copyright laws. See Petition (eighth paragraph of summary); id. ¶ 13; First Supplement ¶¶ 5, 8, 9. 9/ Rather than amending a Commission rule affecting an entire market, the more appropriate test for determining whether WWAT is entitled to the same copyright advantages in Columbus as stations licensed to Columbus is whether WWAT is "significantly viewed" in Columbus under the standards set forth in Section 76.54. See 17 U.S.C. § 111(c); 47 C.F.R. §§ 76.59, .61, .63 (1976). WWAT, however, did not even attempt

8/ This is especially true considering that WWAT's owner could have petitioned the Commission to amend Section 76.51 before investing its resources and proceeding with construction.

9/ Because Columbus cable companies now must carry WWAT since it is located within the Columbus ADI, see 47 C.F.R. § 76.56(b), the only issue at stake is whether WWAT may be carried free of copyright liability as a "local" signal based on the hyphenation of the Columbus market.

to prove that it is "significantly viewed" in the Columbus market. 10/

V. Conclusion.

Despite the advantage of not having to respond to comments opposing its petition to amend the Columbus market designation, WWAT failed to demonstrate the commonality between the Columbus and Chillicothe markets required under the R&O and Commission precedent for amending Section 76.51. More importantly, the Commission failed to provide WSYX and other interested parties the notice and opportunity to comment on WWAT's proposal required under the APA. By not stating the reasons or justification for granting WWAT's proposal, the Commission's decision to amend the Columbus market designation was unreasoned and arbitrary and capricious.

10/ To do so, WWAT would have had to make the special showing required under Section 76.51 to actually prove that it is fact

For the Commission's rulemaking to be legitimate, effective, and fair, "there must be an exchange of views, information, and criticism between interested parties and the agency." Home Box Office, Inc., 567 F.2d at 35 (emphasis in original). Because such an exchange did not occur here, and for all of the foregoing reasons, WSYX respectfully requests that the Commission expeditiously reconsider its decision to amend Section 76.51 to include Chillicothe in the Columbus market designation under Rule 76.51.

Respectfully submitted,

HOGAN & HARTSON

Jim C. R. 1

CERTIFICATE OF SERVICE

I, Susan J. Mavronicles, a legal secretary at the law firm of Hogan & Hartson, hereby certify that on this 3rd day of May, 1993, I caused to be served by hand-delivery, a copy of the attached PETITION FOR RECONSIDERATION filed on behalf of Anchor Media Ltd., to the following:

Chairman James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, D.C. 20554

Commissioner Ervin S. Duggan
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

And by first-class mail, postage prepaid, to:

Roy F. Perkins, Jr.
1724 Whitewood Lane
Herndon, Virginia 22070

Attorney of record for
Triplett & Associates, licensee of
WWAT(TV)
Chillicothe, Ohio


Susan J. Mavronicles